

8 MACIEL BUILDERS LLC, an Arizona  
9 limited liability company,

10 Plaintiff,

11 v.

12 US FRAMING INTERNATIONAL LLC, a  
13 Florida limited liability company, et al.,

14 Defendants.

15 US FRAMING WEST, INC., a Nevada  
16 corporation,

17 Counterclaimant,

18 v.

19 MACIEL BUILDERS LLC, an Arizona  
20 limited liability company,

21 Counterdefendant.

22 US FRAMING WEST, INC., a Nevada  
23 corporation,

24 Third-Party Plaintiff,

25 v.

26 JOSE MACIEL, and individual,

27 Third-Party Defendant.

Case No. 19-cv-03660-BLF

**ORDER TERMINATING AS MOOT  
JOSE MACIEL'S MOTION TO  
DISMISS THIRD PARTY  
COMPLAINT AND VACATING  
HEARING ON MOTION; AND  
DIRECTING DEFENDANTS TO FILE  
A STIPULATION AND PROPOSED  
ORDER FOR DISMISSAL OF CASE,  
OR A FURTHER STATUS REPORT,  
ON OR BEFORE AUGUST 26, 2020**

[Re: ECF 91, 95]

1        This order addresses (1) third-party defendant Jose Maciel’s motion to dismiss the third-  
2 party complaint; and (2) the status of the action with respect to the remaining parties. For the  
3 reasons discussed below, Jose Maciel’s motion to dismiss is TERMINATED AS MOOT and the  
4 hearing on the motion, currently set for October 22, 2020, is VACATED. With respect to the  
5 remaining parties, Defendants SHALL file a stipulation and proposed order for dismissal of the  
6 case, or further status report, on or before August 26, 2020.

7        **I. BACKGROUND**

8        This action arises from a dispute over carpentry work performed by Plaintiff Maciel  
9 Builders, LLC (“Maciel Builders”) on a construction project known as Ohlone Block B in San  
10 Jose, California. Maciel Builders claims that it was not paid for work it performed on the project.  
11 In June 2019, Maciel Builders filed this lawsuit against the following entities and individuals,  
12 asserting a claim for breach of contract, related state law claims, and a federal civil RICO claim:  
13 US Framing International, LLC (“US Framing International”); US Framing West, Inc. (“US  
14 Framing West”); Thomas G. English (“English”); Nicholas Rivera (“Rivera”); Ivan Villalva  
15 (“Villalva”); Joe Garcia (“Garcia”), Matthew Phillips (“Phillips”), and Ryan Therrien  
16 (“Therrien”). *See* Compl., ECF 1.

17        US Framing International, US Framing West, English, Rivera, and Villalva (collectively,  
18 “Defendants”) answered the complaint on February 28, 2020. *See* Answer, ECF 65. On the same  
19 date, US Framing West filed a counterclaim against Maciel Builders and a third-party complaint  
20 against the principal of Maciel Builders, Jose Maciel. *See* Counterclaim, ECF 66; Third-Party  
21 Compl., ECF 67.

22        The other three defendants – Garcia, Phillips, and Therrien – were dismissed without  
23 prejudice for failure to effect service of process. *See* Order Dismissing Unserved Defendants,  
24 ECF 59.

25        On April 1, 2020, Maciel Builders filed a “Responsive Pleading” to the counterclaim  
26 asserted against it by US Framing West, stating that Maciel Builders had filed a Chapter 7  
27 bankruptcy petition in the United States Bankruptcy Court for the District of Arizona. *See*  
28 Responsive Pleading, ECF 80. On April 6, 2020, this Court issued an order staying the present

1 case in its entirety for ninety days, through July 6, 2020. *See Order Staying Case*, ECF 83. The  
2 Court noted that Maciel Builders' claims against Defendants are the property of the bankruptcy  
3 estate and may be pursued only by the Chapter 7 Trustee, and that US Framing West's  
4 counterclaim against Maciel Builders is subject to the automatic bankruptcy stay. *See id.* The  
5 Court directed Defendants to file a status report upon expiration of the ninety-day stay, sharing  
6 any information Defendants obtained as to whether the Trustee of Maciel Builder's bankruptcy  
7 estate would be filing an appearance in this case. *See id.*

8 In violation of the ninety-day stay, Jose Maciel filed a motion to dismiss US Framing  
9 West's third-party complaint on June 9, 2020. *See First Motion to Dismiss*, ECF 86. The Court  
10 struck the motion to dismiss without prejudice to refiling after the stay was lifted. *See Order*  
11 *Striking Motion to Dismiss*, ECF 87.

12 Defendants filed a status report on July 7, 2020, advising that US Framing International,  
13 US Framing West, and English had entered into a settlement agreement with the Chapter 7 Trustee  
14 that, if approved by the Bankruptcy Court, would resolve all of Maciel Builders' remaining claims  
15 against all Defendants. *See Status Report*, ECF 88.

16 On July 9, 2020, US Framing West filed a voluntary dismissal of its third-party complaint  
17 against Jose Maciel, without prejudice. *See Notice of Voluntary Dismissal*, ECF 89. On July 10,  
18 2020, Jose Maciel filed a document titled "Rejection of Notice of Voluntary Dismissal from Third  
19 Party Plaintiff," asserting that the dismissal was ineffective. *See Rejection*, ECF 90. On the same  
20 date, Jose Maciel also filed a motion to dismiss the third-party complaint. *See Second Motion to*  
21 *Dismiss*, ECF 91.

22 On August 10, 2020, Defendants filed a status report informing the Court that the  
23 Bankruptcy Court has approved the settlement agreement between the Chapter 7 Trustee of Maciel  
24 Builder's estate and US Framing International, US Framing West, and English. *See Status Report*,  
25 ECF 95. The Bankruptcy Court's order approving the settlement agreement is attached to the  
26 status report. *See id.* Defendants represent that the settlement agreement resolves all of Maciel  
27 Builders' remaining claims against all Defendants. *See id.* The status report and attached order of  
28 the Bankruptcy Court do not make specific reference to Maciel Builders' claims against Rivera

1 and Villalva, nor do those documents mention US Framing West's counterclaim against Maciel  
2 Builders.

## 3 **II. JOSE MACIEL'S MOTION TO DISMISS THIRD-PARTY COMPLAINT**

4 The third-party complaint filed against Jose Maciel by US Framing West asserts two  
5 claims, both grounded in the theory that Jose Maciel is the alter ego of Maciel Builders. *See*  
6 Third-Party Compl. ¶ 4, ECF 67. In Claim 1, brought under California Business and Professions  
7 Code § 7031(b), US Framing West asserts that: it paid Maciel Builders more than \$1,273,091.13  
8 for work Maciel Builders performed on the project; Maciel Builders is legally required to disgorge  
9 those monies because Maciel Builders did not possess a valid California contractor's license; and  
10 “[a]s the alter ego of Maciel Builders, Jose Maciel is jointly and severally liable to repay all  
11 monies paid to Maciel Builders by U.S. Framing West for work Maciel Builders performed on the  
12 Project.” Third-Party Compl. ¶¶ 10-13. In Claim 2, for breach of contract, US Framing West  
13 asserts that Maciel Builders breached the Sub-subcontract Agreement it entered into with US  
14 Framing West, and that “[a]s the alter ego of Maciel Builders, Jose Maciel is jointly and severally  
15 liable for the damages incurred by U.S. Framing West for Maciel Builders' breaches of the Sub-  
16 subcontract Agreement. Third-Party Compl. ¶¶ 15-19.

17 As discussed above, US Framing West filed a voluntary dismissal of its third-party  
18 complaint against Jose Maciel, without prejudice, on July 9, 2020. *See* Notice of Voluntary  
19 Dismissal, ECF 89. Jose Maciel filed a “rejection” of that voluntary dismissal and a motion to  
20 dismiss the third-party complaint under Federal Rules of Civil Procedure 12(b)(6), 12(b)(1), and  
21 12(b)(2). *See* Rejection, ECF 90; Second Motion to Dismiss, ECF 91. In opposition, US Framing  
22 West asserts that: its voluntary dismissal of the third-party complaint complied with Federal Rule  
23 of Civil Procedure 41; the third-party complaint was terminated on the date the voluntary  
24 dismissal was filed; and Jose Maciel's “rejection” and Rule 12 motion therefore are without legal  
25 effect. *See* Opp., ECF 93. In reply, Jose Maciel argues that the settlement agreement between the  
26 Chapter 7 Trustee and Defendants required US Framing West to dismiss the third-party complaint  
27 against him *with* prejudice, but US Framing West instead voluntarily dismissed the third-party  
complaint *without* prejudice. *See* Reply, ECF 94. Jose Maciel asks the Court to dismiss the third-

1 party complaint with prejudice, and to order US Framing West to pay all of his attorneys' fees.  
2 *See id.* at 6.

3 After reviewing the record and relevant legal authorities, the Court concludes that US  
4 Framing West's voluntary dismissal of the third-party complaint, without prejudice, complied with  
5 Federal Rule of Civil 41 and therefore terminated the third-party complaint as of July 9, 2020.  
6 Jose Maciel's motion to dismiss therefore will be terminated as moot.

7 Federal Rule of Civil Procedure 41 provides in relevant part that, subject to exceptions not  
8 relevant here, "the plaintiff may dismiss an action without a court order by filing . . . a notice of  
9 dismissal before the opposing party serves either an answer or a motion for summary judgment."  
10 Fed. R. Civ. P. 41(a)(1)(A)(i). "This rule applies to a dismissal of any counterclaim, crossclaim,  
11 or third-party claim." Fed. R. Civ. P. 41(c). A third-party plaintiff's voluntary dismissal must be  
12 made: "(1) before a responsive pleading is served; or (2) if there is no responsive pleading, before  
13 evidence is introduced at a hearing or trial." *See id.*

14 At the time US Framing West voluntarily dismissed its third-party complaint, Jose Maciel  
15 had not served "an answer or a motion for summary judgment" as specified in Rule 41(a)(1)(A)(i),  
16 or "a responsive pleading" as specified in Rule 41(c). The voluntary dismissal therefore  
17 terminated the third-party complaint. *See Miller v. Reddin*, 422 F.2d 1264, 1266 (9th Cir. 1970)  
18 ("A voluntary dismissal by a plaintiff under Rule 41(a)(1) Fed. R. Civ. P., automatically  
19 terminates the action upon the filing of the dismissal with the clerk. No order of court is  
20 required."). The Court notes that this result would be the same even if the Court had not struck  
21 Jose Maciel's first motion to dismiss, as a motion to dismiss is not a responsive pleading. *See*  
22 *CRST Van Expedited, Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099, 1104 n.3 (9th Cir. 2007)  
23 ("A Rule 12(b)(6) motion to dismiss is not such a responsive pleading."); *Morrison v. Mahoney*,  
24 399 F.3d 1042, 1046 (9th Cir. 2005) ("A motion to dismiss is not a pleading.").

25 Jose Maciel does not contend that he filed a responsive pleading that would preclude US  
26 Framing West's voluntary dismissal of the third-party complaint under Rules 41(a)(1)(A)(i) and  
27 (c). Instead, he argues that US Framing West's right to voluntarily dismiss the third-party  
28 complaint without prejudice is circumscribed by the settlement agreement entered into between

1 the Chapter 7 Trustee of Maciel Builders' bankruptcy estate and Defendants. Jose Maciel argues  
2 that because that settlement agreement provides for dismissal of Maciel Builder's claims against  
3 Defendants in the main action with prejudice, US Framing West's third-party complaint also must  
4 be dismissed with prejudice. As an initial matter, it does not appear that Jose Maciel is a party to  
5 the settlement agreement, and the Bankruptcy Court's order approving the settlement agreement  
6 does not refer to Jose Maciel or the third-party complaint against him. *See* Status Report, ECF 95.  
7 Even if the settlement agreement could be read to apply to Jose Maciel, however, the proper  
8 mechanism for enforcement would be a separate lawsuit for breach of the settlement agreement.  
9 Jose Maciel has not cited, and this Court has not discovered, any authority suggesting that such an  
10 agreement constrains a party's right to dismiss its complaint pursuant to Rules 41(a)(1)(A)(i) and  
11 (c).

12 Jose Maciel argues that the Court may take the settlement agreement into account when  
13 considering dismissal of the third-party complaint under Rule 41(a)(2). That rule provides that  
14 when voluntary dismissal under Rule 41(a)(1) is not appropriate, "an action may be dismissed at  
15 the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ.  
16 P. 41(a)(2). Jose Maciel's reliance on Rule 41(a)(2) is misplaced because, as discussed above, US  
17 Framing West's dismissal of the third-party complaint was proper under Rules 41(a)(1) and (c),  
18 and terminated the third-party complaint on July 9, 2020. *See* Notice of Voluntary Dismissal,  
19 ECF 89.

20 Because US Framing West's voluntary dismissal terminated the third-party complaint, Jose  
21 Maciel's motion to dismiss the third-party complaint is TERMINATED AS MOOT. The hearing  
22 on the motion, currently set for October 22, 2020, is VACATED.

23 **III. STATUS OF ACTION AS TO REMAINING PARTIES**

24 With respect to the remaining parties, the Court has before it Maciel Builders' complaint  
25 against Defendants US Framing International, US Framing West, English, Rivera, and Villalva,  
26 and US Framing West's counterclaim against Maciel Builders. Defendants' status report filed  
27 August 10, 2020 advises that "Defendants US Framing International, US Framing West and  
28 Thomas G. English entered into a settlement agreement with Dina Anderson, Bankruptcy Trustee

1 for Plaintiff Maciel Buildings [sic] to settle and resolve Maciel Builders' remaining claims against  
2 all defendants in the above referenced action, Case No. 5:19-cv-03660-BLF." Status Report, ECF  
3 95. Defendants also advise that the Bankruptcy Court has approved the settlement agreement, and  
4 they submit a copy of the Bankruptcy Court's order. *See id.* The Court notes that neither the  
5 status report nor the Bankruptcy Court's order specifically refers to Maciel Builders' claims  
6 against Defendants Rivera and Villalva, or US Framing West's counterclaim against Maciel  
7 Builders. It appears that Defendants nonetheless believe that all remaining claims in the case have  
8 been resolved.

9 Because Maciel Builders' claims against Defendants are the property of the bankruptcy  
10 estate and may be pursued only by the Chapter 7 Trustee, this Court cannot dismiss Maciel  
11 Builders' claims without the consent of the Trustee. Because US Framing West's counterclaim  
12 against Maciel Builders is subject to the automatic bankruptcy stay, this Court cannot dismiss the  
13 counterclaim absent approval of the Bankruptcy Court.

14 Defendants SHALL file a stipulation and proposed order dismissing all remaining claims  
15 and the counterclaim in this case, signed by the Chapter 7 Trustee and all Defendants or their  
16 representatives, on or before August 26, 2020. The stipulation and proposed order shall state  
17 expressly that the Trustee approves the dismissal of Maciel Builder's claims against all  
18 Defendants, including Rivera and Villalva, and that the Bankruptcy Court approves the dismissal  
19 of US Framing West's counterclaim against Maciel Builders. Alternatively, Defendants SHALL  
20 file a further status report on or before August 26, 2020 regarding the status of the remaining  
21 claims and counterclaim in this case.

22 **IV. ORDER**

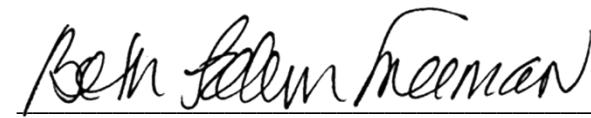
23 (1) Third-party defendant Jose Maciel's motion to dismiss the third-party complaint is  
24 TERMINATED AS MOOT and the hearing on the motion is VACATED;  
25 (2) Defendants SHALL file a stipulation and proposed order dismissing all remaining  
26 claims and the counterclaim in this case, signed by the Chapter 7 Trustee and all  
27 Defendants or their representatives, on or before August 26, 2020. The stipulation  
28 and proposed order shall state expressly that the Trustee approves the dismissal of

1 Maciel Builder's claims against all Defendants, including Rivera and Villalva, and  
2 that the Bankruptcy Court approves the dismissal of US Framing West's  
3 counterclaim against Maciel Builders.

4 (3) Alternatively, in lieu of the stipulation and proposed order described above,  
5 Defendants SHALL file a further status report on or before August 26, 2020  
6 regarding the status of the remaining claims and counterclaim in this case.

7 (4) This order terminates ECF 91.

8  
9 Dated: August 17, 2020



10  
11 BETH LABSON FREEMAN  
12 United States District Judge